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Equal Protection, Title VII, and Sex-Based Morality Tables

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EQUAL PROTECTION, TITLE VII, AND SEX-BASED MORTALITY TABLES

INTRODUCTION

Mary Robertson is a teacher in an Indiana school district. She contributes three percent of her annual salary to an annuity account maintained by the Indiana State Teachers' Retirement Fund. When she retires she will receive approximately fifteen dollars per month less than a male teacher who has contributed the same amount to the fund.[1] Marie Manhart is an employee of the City of Los Angeles, Department of Water and Power. She contributes a portion of her salary to the department's retirement plan and her contribution is matched by her employer in an amount equal to 110% of her contribution. A male employee with the same salary contributes fifteen percent less to the plan. Upon retirement, Marie Manhart and her male counterpart will receive identical monthly checks but she will have contributed more into the retirement plan.[2]

The reason for these discrepancies can be traced to the fact that both retirement plans utilize sex-based mortality tables to compute, in one case, the amount of the benefit, and in the other, the amount of an employee's contribution to the annuity fund. Since these tables reflect that, on the average, women live five years longer than men, the two funds require, respectively, that a woman who makes the same contribution as a man must receive a smaller monthly check because she will live five years longer in which to collect her annuity payment, and that a woman who receives the same monthly check as a man must make a larger contribution to the fund since she will be likely to receive an extra five years of payments.

One case, *Reilly v. Robertson*, held that such dissimilar treatment of similarly situated employees violated the equal protection clause of the fourteenth amendment to the United States Constitution.[3] The other case, *Manhart v. City of Los Angeles, Department of Water and Power*, held

1. Reilly v. Robertson, 360 N.E.2d 171, 172 (Ind.), *cert. denied*, 98 S. Ct. 73 (1977).
2. Manhart v. City of Los Angeles, Dept. of Water and Power, 553 F.2d 581, 583 (9th Cir. 1976), *cert. granted*, 98 S. Ct. 51 (1977).
3. 360 N.E.2d at 179.

that the treatment violated Title VII of the Civil Rights Act of 1964.[4] It is the thesis of this article that despite these similar results, the Court of Appeals for the Ninth Circuit in *Manhart* was correct in its judgment and the Indiana Supreme Court in *Reilly* was incorrect. This article will carefully examine the rationales of the two cases.[5] Annuities, the context in which the dissimilar treatment arises, and the use of sex-based mortality tables will also be explained and analyzed.[6] This article will then independently evaluate the applicability of the fourteenth amendment and of Title VII, and conclude that although Title VII has been violated the fourteenth amendment has not.[7] This examination will also reveal that Title VII requires equal contributions and equal benefits in the context of annuity funds. Finally, the objections of male annuitants will be considered and refuted.[8]

I. THE USE OF MORTALITY TABLES IN THE ANNUITY CONTEXT

Understanding how a sex-based mortality table works is essential to determining if a violation of either the fourteenth amendment or Title VII has occurred. This understanding must include what an annuity is, how it operates, the purposes of a retirement plan, and the justifications for the use of these tables.

Sex-Based Mortality Tables

A mortality table is made up of two columns of figures showing the number of people living and dying at designated ages. From it, the death rate for each age can be determined.[9] A mortality table may be constructed from general population statistics, but the tables in use today, which are required by most state insurance departments, have been constructed from the mortality statistics of insured lives.[10] Data is collected showing (1) the age at which persons come under observation; (2) the duration of the period of observation; and (3) the number dying during one year, for

4. 553 F.2d at 590.
5. *See* notes 27-68 *infra* and accompanying text.
6. *See* notes 9-26 *infra* and accompanying text.
7. *See* notes 69-94 *infra* and accompanying text.
8. *See* notes 95-107 *infra* and accompanying text.
9. AMERICAN COUNCIL OF LIFE INSURANCE, LIFE INSURANCE FACT BOOK 124 (1977) [hereinafter cited as FACT BOOK]. The mortality tables at issue in *Reilly* were the *1971 Group Annuity Mortality Tables-Male* and that same table, with a five year set-back, was used for female teachers. 360 N.E.2d at 173. *See* FACT BOOK at 108-09 for a reprint of the former table.
10. S. HUEBNER & K. BLACK, LIFE INSURANCE 132 (5th ed. 1958) [hereinafter cited as HUEBNER]. The reason tor this is that statistics of insurance companies bear out the fact that if the population as a whole were divided into those who were insured and those who

each age.[11] This data is subsequently compiled into a mortality table. Using the table one can determine both the probability of death and the probability of survival for an individual of a certain age.[12]

The foremost purpose of a mortality table is to enable an insurer to calculate contribution rates. Its purpose is not to provide a determination of when an individual will die but to provide a determination of the death rate of a group as a whole.[13] It is on the basis of this death rate that an insurer sets the contribution rates.[14] The death rate determines the insurer's cost and this cost determines the contribution level.

A mortality table can be made up of various groupings of individuals,[15] but the grouping chosen must consist of a sufficiently large number of individuals to allow the law of average to operate.[16] Obviously, there must be a high correlation between the grouping chosen and the rate of mortality. Insurers prefer both that the grouping be one which includes the greatest number of similar individuals and that the similarity these individuals share be one highly predictive of the individuals' longevity.

Present mortality tables are sex-based. An example is the tables

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were uninsured, the former group would show a much lower rate of mortality than the latter. An attempted explanation for this phenomenom in the context of annuities is that annuities result in freedom from the financial burdens of retirement:

> Freedom from financial worry and fear, and contentment with a double income, are conducive to longevity. If it be true that half of human ailments are probably attributable at least in part to fear and worry, the effectiveness of annuities towards health and happiness must be apparent. I am inclined to believe that annuities serve in old age much the same economic purpose that periodic medical examinations do during the working years of life.

HUEBNER at 104.

11. *Id.* at 135. It should be noted that this data is required from a great number of individuals to guarantee that the law of average works correctly. This requires a large number of individuals to guarantee that great fluctuations in the results will be eliminated. See *id.* at 123-31 for a discussion of the law of average as it relates to the theory behind a mortality table.

12. These probabilities will be conservatively stated, however, as compared to the actual mortality rates expected. This conservatism is necessary because an insurer who overestimates the mortality rate of its annuitants (thus underestimating their life expectancies) will not have collected enough money in contributions to make the monthly payments to those annuitants who exceed their life expectancies. Indeed, a note accompanying *1971 Group Annuity Mortality Table-Male* states that it is "conservative as related to the actual experience upon which [it is] based." FACT BOOK, *supra* note 9, at 109. For an example of this conservatism, see the above mentioned table, which estimates that of 1000 males aged 109 years old, only 725.52 of them are likely to die within the year. *Id.*

13. A mortality table can predict fairly accurately the death rate of a group because of the law of average. *See* note 11 *supra*. Because, however, of the wide individual fluctuations within a group (which are ironed out due to the great number of individuals making up the group) the table is not very useful as an indicator of individual life expectance. It can only reflect the probability that out of a certain number of individuals, death will occur at a certain rate.

14. *See* note 22 *infra*.

15. *See* HUEBNER, *supra* note 10, at 482-87 for various groupings possible.

16. *See* note 11 *supra*.

utilized in *Reilly*. Those tables consisted of one set of statistics for men and the same set, but with a five year set-back, for women.[17] The reason for this is the inescapable fact that women as a group live longer than men as a group.[18] No matter what the reasons are for female longevity,[19] it is obvious that it makes sex a desirable grouping characteristic to insurers; it groups a great number of individuals and the similarity these individuals share is highly predictive of the individuals' longevity.

Annuities

An annuity is a periodic payment which is to commence at a stated or contingent date and to continue throughout a fixed period, or for the duration of a life or lives, in return for the payment of a stipulated amount.[20] In the contexts of *Reilly* and *Manhart*, an annuity is a monthly payment commencing upon retirement and continuing for the duration of the annuitant's life. It should be emphasized that an annuitant will collect the periodic payments for as long as he or she lives: the amount accumulated as a result of the annuitant's contributions into the annuity account does not limit the number of monthly payments or total amount which he or she may eventually receive. Likewise, however, the annuitant may not recover the entirety of his or her contributions because the annuitant's death will terminate the payments.[21] Therefore, an annuity

17. *See* note 9 *supra*.

18. Gerber, *The Economic and Actuarial Aspects of Selection and Classification*, 10 FORUM 1205, 1218 (1975) [hereinafter cited as FORUM]. *See* FACT BOOK, *supra* note 9, at 91 for tables compiled by the U.S. Department of Health, Education, and Welfare showing Expectation of Life at Birth in the United States and Expectation of Life at Various Ages in the United States, 1975. The latter table reveals that at age 65 male life expectancy is 13.7 years and female life expectancy is 18.0 years. Not only do women as a group live longer but also the gain in life expectancy for women since the turn of the century has been greater than for men at nearly all ages. *Id.*

19. As to the reasons for the longevity of women as a group: "The general concensus is that the mortality differential between men and women cannot be satisfactorily explained by environmental, occupational or economic differences and that women do have an innate biological or genetic advantage over men." FORUM, *supra* note 18, at 1220.

20. HUEBNER, *supra* note 10, at 91; FACT BOOK, *supra* note 9, at 117. See I. RUBINOW, SOCIAL INSURANCE 318 (1969) for a presentation of the basic facts underlying annuities in elementary and non-technical language. See Note, *Sex Discrimination and Sex-Based Mortality Tables*, 53 B.U.L. REV. 624, 625-35 (1973) for a highly technical and well-researched presentation of the same issues.

21. Note that this is one aspect in which an annuity differs from a life insurance policy. An insured holding an ordinary life insurance policy pays premiums which accumulate in a lump sum. Upon the death of the insured the insurer will pay out the face amount of the policy. The insured is contributing toward a lump sum payment upon death; the annuitant is contributing toward the payment of a certain sum at certain intervals until death. As the Indiana Supreme Court stated in *Reilly*, "An annuity insures against the risk of living too long while a life insurance policy insures against the risks resulting from premature death." 360 N.E.2d at 173.

account must be adequately funded to provide monthly benefits for the lifetime of its annuitants and must have the resources available from which to make these monthly payments. The account's managers must know, approximately at least, how much money will be required to meet these obligations. Mortality tables must allow those who manage the annuity account to accurately estimate the amount needed to provide these monthly payments.[22]

If an annuitant fulfills his or her life expectancy, as reflected in the mortality tables, such annuitant will receive the full benefit of his or her contribution, no more, no less. If the annuitant should exceed his or her life expectancy, this annuitant's additional monthly benefits would be derived from the contributions of those annuitants who failed to fulfill their life expectancies. If, on the other hand, the annuitant should die before his or her life expectancy, the annuitant would not receive the full benefit of his or her contribution and the excess would go to provide income for those who do outlive their life expectancies. In this way the annuity system provides a financially sound arrangement whereby one's financial needs during the retirement years are assured of being satisfied irrespective of whether one exceeds, fulfills, or fails to fulfill one's life expectancy.[23]

In the context of an annuity fund, the use of sex-based mortality tables leads to the problems found in *Reilly* and *Manhart*. In *Reilly*, Mary Robertson contributed the same amount into the fund as did a similarly situated male teacher, yet she received a smaller monthly annuity payment,[24] because, theoretically, she will live a longer time during which to collect the monthly payments. In *Manhart*, the plaintiff received the same monthly payment as a similarly situated male employee but she had to contribute more into the fund to obtain it.[25] Her equal

22. See HUEBNER, *supra* note 10, at 163-74 for how to determine the amount of an annuitant's contribution.

23. *Id.* at 92.

24. 360 N.E.2d at 172.

25. 553 F.2d at 583. This article is concerned only with this specifically mentioned differential treatment of annuitants resulting from the use of sex-based mortality tables. Other features of retirement plans have also been the subject of suit. *See* Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90 (3d Cir. 1973) (men subject to higher optional and mandatory retirement ages before they could receive full benefits). *Accord*, Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971); Fitzpatrick v. Bitzer, 390 F. Supp. 278 (D. Conn. 1974), *rev'd in part and aff'd in part on other grounds*, 427 U.S. 445 (1976); Chastang v. Flynn & Emrich Co., 365 F. Supp. 957 (D. Md. 1973), *aff'd in part*, 541 F.2d 1040 (4th Cir. 1976). *See also* two Social Security cases: Califano v. Goldfarb, 97 S. Ct. 1021 (1977); Gruenwald v. Gardner, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968).

monthly benefits cost more since she, again theoretically, will live longer to collect them.[26]

II. JUDICIAL INTERPRETATIONS OF SEX DISCRIMINATION

Reilly v. Robertson

Mary Robertson, the Indiana school teacher, filed suit against the Board of Trustees of the Indiana State Teachers' Retirement Fund and against its members as individuals.[27] She alleged that the board's use of sex-based mortality tables would result in her receiving approximately fifteen dollars less per month in retirement benefits than male teachers of the same age and teaching experience. She advanced four theories of recovery based upon the board's adoption and use of the sex-based mortality tables. Specifically, she alleged that the board had violated: (1) the due process and equal protection clauses of the fourteenth amendment to the United States Constitution[28] and the rights and privileges clause of the Indiana Constitution;[29] (2) the Civil Rights Act of 1871,[30] (3) Title VII of the Civil Rights Act of 1964; and (4) the obligation of contracts clauses in the United States Constitution[31] and the Indiana Constitution.[32] The trial court held, *inter alia*, that the use of separate mortality tables

26. Both Mary Robertson's and Marie Manhart's annuities were paid to them through a group pension and retirement program set up by their employers. According to figures in the FACT BOOK, *supra* note 9, at 36, in 1975 11,230,000 other state and municipal employees were covered by pension and retirement programs set up by their employers. For the figures on other types of employees covered, see *id.*

27. The suit, filed as a class action, was brought on behalf of the class of female teachers retired or eligible for retirement. 360 N.E.2d at 172. *But see* Spirt v. Teachers Ins. & Annuity Ass'n, 416 F. Supp. 1019, 1023 (S.D.N.Y. 1976) in which the plaintiff teacher was denied class action certification on the grounds that the issue presented was a narrow one whose resolution would not be assisted by the maintenance of the suit as a class action. Spirt had charged that the use of sex-based mortality tables and the resulting disparity in treatment of female teachers violated the fourteenth amendment to the U.S. Constitution, Title VII of the Civil Rights Act of 1964, and the Equal Pay Act of 1963.

28. U.S. CONST. amend. XIV states in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

29. IND. CONST. art. 1, § 23 states: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

30. The Civil Rights Act of 1871 as codified at 42 U.S.C. § 1983, provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970).

31. U.S. CONST. art. I, § 10, cl. 1.

32. IND. CONST. art. 1 § 24.

deprived Mary Robertson and her fellow female teachers of equal protection and equal privileges, in that there was no rational basis for the classification of retired teachers by sex, and that the differential payments constituted an unlawful employment practice under Title VII of the Civil Rights Act of 1964.[33]

On appeal to the Indiana Supreme Court, the board challenged these holdings.[34] The board argued that the classification of annuitants by sex served to promote the objective of the teachers' retirement legislation by insuring the financial security of the fund. Further, the board argued that it was more equitable for men to be paid greater annuity benefits than women because men as a group do not live as long as women as a group and therefore have a shorter period of time after retirement in which to collect periodic payments. Finally, the board contended that payment of equal annuity portions would be tantamount to requiring the men in the plan to subsidize the women.[35]

The Indiana Supreme Court decided that in order for the the use of sex-based mortality tables to comport with the equal protection clause, the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall

33. 360 N.E.2d at 172. The trial court also held that the board members were not liable under 42 U.S.C. § 1983 (1970) and that the board had not impaired the obligation of contracts. Because it had severed the trial of the issues of liability and damages, the trial court appointed a master to investigate the amount of individual damages for members of the class. The master's fee was assessed against the fund. On appeal, the board challenged the excessiveness of the master's fee and the scope of the directions given him by the trial court. *Id.* at 179-80.

34. *Id.* at 173. Also challenged on appeal was the decision that the use of separate mortality tables violated both the due process clause of the fourteenth amendment and the supremacy clause of Article IV of the United States Constitution. The Indiana Supreme Court did not consider any of the contentions other than the one concerning the equal protection clause of the fourteenth amendment and the equal privileges clause of the Indiana Constitution. The court regarded the determination of unconstitutionality under equal protection analysis as a sufficient basis for affirming the trial court. The determination of unconstitutionality under the Indiana Constitution gave the decision adequate and independent state grounds on which the U.S. Supreme Court could conceivably have based its denial of certiorari. See Reilly v. Robertson, 98 S. Ct. 73 (1977).

35. 360 N.E.2d at 176-77.

The court also noted that the tables in question were adopted for use by the Fund in 1972.

> Prior to 1972 the Fund for many years in making the calculation of annuity portions used a mortality table which did not subclassify annuitants by sex, and in fact similarly situated male and female annuitants received the same amounts. The contributions of men and women teachers have been equal. The eligibility requirements for participation in the retirement program have been the same for men and women. And both prior to and after 1972, the life expectancy of women as a group has been greater than that of men as a group.

Id. at 173. *See* note 81 *infra*.

be treated alike."[36] The court found that the object of the legislation was "to provide an incentive to all teachers to remain in teaching as a lifetime career and to accept the moderate salaries paid teachers, and to forego opportunities in other areas of employment as they may arise."[37] In deciding that the classification of annuitants by sex was arbitrary and without rational relationship to the object of the legislation, the Indiana Supreme Court basically adopted the findings of the trial court, which had emphasized (1) that sex is only one of innumerable factors influencing life expectancy and other such factors are ignored; (2) that group mortality statistics ignore the traits of the individual female; (3) that 82.9% of females will have the same year of death as 82.9% of the males;[38] and (4) that additional income given retired males monthly will permit them to live in retirement more comfortably than retired females.[39]

With respect to the arguments of the board,[40] the court pointed out that there was no evidence that adoption of sex-based mortality tables would insure the financial security of the fund.[41] Since the court's emphasis was on the equality of monthly payments, not the equality of lifetime payments, the board's second argument likewise carried little weight. Equality of payments would result when all similarly situated teachers received equal monthly payments, not when male teachers as a

36. *Id.* at 175. The court said that the classification must satisfy this same standard to comport with the rights and privileges clause of the Indiana Constitution. The standard enunciated is that of the traditional, rational basis equal protection scrutiny. *See* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). It is the easiest standard to satisfy as it presumes the classification is constitutional and gives the defendant great latitude in proving that it is reasonable. The court found it unnecessary to apply a higher standard of review to the classification in question because the classification could not even satisfy the rational basis test. See notes 70-74 *infra* and accompanying text for a discussion of fourteenth amendment equal protection analysis.

37. 360 N.E.2d at 176. The legislation involved was IND. CODE ANN. §§ 21-6-1-1 to 21-6-1-13 (Burns 1975) (repealed 1976). For the present law see IND. CODE ANN. §§ 21-6.1-1-3 to 21-6.1-7-10 (Burns Cum. Supp. 1977). There is no indication as to how the court identified the legislative purpose. "As described both by the parties and the trial court, it is to provide an annuity for teachers who retire with the funds which they contribute based on the teacher's age at the nearest birthday at the time of beginning service . . . based on actuarial computations . . . ." Brief of Amicus Curiae, Ass'n of Indiana Legal Reserve Life Insurance Companies, at 11.

38. Consequently the females dying in the same year as the males, will have received fewer benefits.

39. 360 N.E.2d at 176. The last finding of the trial court was emphasized by the Indiana Supreme Court. The court stressed the importance of having an equal amount of monthly income with which to meet equal daily human needs. "By providing greater payments to men, the . . . Fund has provided men with a greater panoply against risks arising from daily human needs." *Id.* at 178.

40. *See* notes 33-34 *supra* and accompanying text.

41. 360 N.E.2d at 176. Here the supreme court looked to the finding of the trial court that a mortality table which ignored the sex of the annuitant had been used for many years

group received the same amount over a lifetime as women teachers as a group. The board also argued that if, as the court asserted, the purpose of the pension legislation was to encourage teachers to remain in teaching, that purpose would by frustrated by requiring a male teacher to, in effect, provide, through his contribution, some of the money which would be used to pay a female teacher's benefits.[42] The court concluded that the possibility of this influencing a male teacher to leave the teaching profession was speculative and remote.[43] The court also felt it was likely that a male teacher would consider any such differential in light of the equal manner in which male and female teachers have qualified by service, age, and contribution, and in light of the equal daily human needs faced by both male and female annuitants. Upon such consideration, the male teacher would discount such differential in deciding whether to accept some offer of employment outside public school teaching.[44]

Thus, the Indiana Supreme Court concluded that the difference in treatment according to the sex of annuitants, resulting from the different group mortality experience, bore no real and substantial relationship to the purposes of the legislation. Therefore, the adoption and use of the sex-based mortality tables violated the equal protection clause of the fourteenth amendment and the equal rights and privileges clause of the Indiana Constitution.[45]

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prior to 1972 during which the solvency of the fund was not placed in jeopardy to any degree. *See* note 35 *supra*.

42. This situation would arise, argued the board, since, if the benefits are required to be equal, the already equal contribution levels would have to be raised to provide the funds for the increase in the monthly benefits of female teachers. 360 N.E.2d at 177.

43. *Id.* It should be noted that the retired teacher's monthly payment is made up of a pension portion and an annuity portion. The pension portion is approximately 87% of the total check, is paid solely from contributions of the state, and is the same for all teachers who are similarly situated with respect to age, years of service, salary, and date of retirement. The annuity portion is approximately 13% of the total check and is paid solely from contributions of the teacher into the annuity account. *Id.* at 173. The board uses the sex-based mortality tables in question to calculate only the annuity portion of the check. It is because this annuity portion makes up only 13% of the total check that the court found that the chances of a male teacher's leaving teaching because of the subsidation factor to be remote. *Id.* at 175.

44. *Id.* at 177. It has been suggested that this part "of the opinion [is] a little muddy. A more logical explanation would have been to recognize the difference in group effect, but to provide that it was justified because of the overriding purpose of the statute." Letter from Lewis C. Bose for amicus curiae Ass'n of Indiana Legal Reserve Life Insurance Companies to Daniel F. Case, American Council of Life Insurance (June 23, 1977); on file in *Tulsa Law Journal* office.

45. The decision is interesting in that it does not address the issue of the board's intent in using the sex-based mortality tables: Whether the discrimination, resulting from their adoption and use, was purposeful on the part of the board. The U.S. Supreme Court has held that a discriminatory effect of legislation, which is indeed present in *Reilly*, is not

Manhart v. City of Los Angeles, Dept. of Water and Power

Marie Manhart, an employee of the City of Los Angeles, Department of Water and Power also filed suit against her employer.[46] She claimed that the policy of the department which required her to contribute approximately fifteen percent more to the department's retirement plan than a male employee identically situated violated (1) Title VII of the Civil Rights Act of 1964;[47] (2) 42 U.S.C. § 1983; (3) the fourteenth amendment to the U.S. Constitution; and (4) Article 1, sections 1 and 21 of the California Constitution.[48] The district court had held that the department's practice of requiring women to make larger monthly contributions to the retirement plan constituted discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex," within the meaning of Title VII.[49] The district court supported its holding

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enough to cause a violation of the U.S. Constitution. Demonstration of a discriminatory purpose for the legislation is critical in making out an equal protection violation. *See* Washington v. Davis, 426 U.S. 229, 238 (1976). *See also* notes 80-81 *infra* and accompanying text.

46. This action was a class action in which Manhart was joined by Carolyn Mayshack and other employees of, and retirees from, the department. The defendants also included the Board of Commissioners of the Department, the Board of Administration of the Department's Employees' Retirement, Disability, and Death Benefit Insurance Plan, the department's chief accounting officer, and department's general manager. 553 F.2d 581, 583 (9th Cir. 1976), *cert. granted*, 98 S. Ct. 51 (1977).

47. It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

42 U.S.C. § 2000e-2(a)(1) (1970).

48. The California Constitution provides in the respective sections that: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness." CAL. CONST. art. I, § 1. "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon such terms, shall not be granted to all citizens." CAL. CONST. art. I, § 1. *See* 553 F.2d at 584.

The only contention addressed by the ninth circuit was the first one dealing with Title VII. The progress of *Manhart* in and out of the district court was quite tortured. *See id.* at 584-85. One of the judgments appealed was an injunction issued by the district court prohibiting larger contributions from women than from men and requiring restitution of the excess contributions previously paid. Another judgment of the district court on appeal was that granting the plaintiffs' motion for summary judgment on the grounds that the retirement plan, by requiring larger contributions from female than from male employees, violated Title VII. This summary judgment mentions nothing about Manhart's other three claims. It is these two judgments which the court of appeals considered in *Manhart*. It should also be emphasized that while *Reilly* was an appeal from a judgment issued after a trial on the merits, *Manhart* was an appeal from summary judgment on plaintiff's motion.

49. 387 F. Supp. at 982.

by looking to the basic requirement of Title VII: that an individual evaluation of an employee be made rather than a prediction made on the basis of a sex-defined group.[50]

On appeal to the Ninth Circuit Court of Appeals, the department admitted that requiring women to make larger contributions discriminated against women, but maintained that the discrimination was one based on longevity rather than on sex. The department urged that the discrimination was not the kind of invidious discrimination which Title VII was intended to abolish.[51] The department explained its reliance on longevity as a basis for requiring larger contributions from women by pointing out that women get the same monthly benefits upon retirement as do men and on the average, women live approximately five years longer than men. For these reasons, women must, as a group, contribute more.[52]

The opinion of the court of appeals recognized that there were business justifications for the use of sex-based mortality tables. Similarly, the court agreed that an informed prediction of an individual's longevity is a relevant characteristic in determining how large an individual's retirement contribution should be. Since it is impossible to determine when an individual will die at the time when the contribution rate is set, the court recognized the value in allowing group longevity statistics to be attributed to the individual members of a group. Of even more importance to the court, however, was the underlying purpose of Title VII: "[T]o require employers to treat each employee as an individual and to make job related decisions about each employee on the basis of relevant *individual* characteristics, so that the employee's membership in a . . . sexual group is irrelevant to the decisions."[53] Thus the court was faced with a situation in which the relevant individual characteristic—longevity—cannot be measured for each individual, and an attempt to measure it on a group basis gives rise to a per se violation of Title VII.[54]

50. "The basic principle . . . is that sexual discrimination under [Title VII] exists whenever general fact characteristics of a sex-defined class are automatically applied to an individual within that class." *Id.* at 983.

51. 553 F.2d at 585.

52. Whereas the annuity portion of the retirement plan involved in *Reilly*, 360 N.E.2d at 173, was financed solely through employee contributions, the retirement plan involved in *Manhart* was financed by employee contributions matched 110% by the department. *See* Henderson v. Oregon, 405 F. Supp. 1271 (D. Ore. 1975) for a case in which a plan almost identical to that involved in *Reilly* was held to violate Title VII. The decision cited and relied heavily on the district court opinion in *Manhart*, 387 F. Supp. 980.

53. 553 F.2d at 585 (emphasis added).

54. It should be noted that although it is valid to state that women as a class live longer than men as a class, there is a substantial range of standard deviation within the class.

The department argued the applicability of several exceptions to Title VII and the court considered each in detail. The bona fide occupational qualification (BFOQ) defense is applicable only when sex discrimination is necessary to protect the essence of a business function.[55] Assuming the business function of the department was to provide employees with a stable and secure pension program, the court found no evidence that protecting this business function required sex-based mortality tables. The court found that use of such tables may be convenient but pointed out that individual distinctions other than longevity could have been considered.[56]

The department also argued that the Bennett Amendment to Title VII permitted the use of sex-based mortality tables.[57] The department identified the "factor other than sex," on which a differential wage payment may be made, as longevity. The court replied, "[I]t does not seem reasonable to us to say that an actuarial distinction based entirely on

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> [A]nalysis of men and women in the general population shows that 68.1% of each of two equal samples of men and women aged 65 exhibit the same mortality patterns. Only 16% of the group, women, live longer and only 16% of the group, men, die sooner than the overwhelming majority of both men and women participants.

Bernstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs*, 74 COLUM. L. REV. 1203, 1220 (1974). See note 39 *supra* and accompanying text for statistics cited by the Indiana Supreme Court in *Reilly*.

55. 42 U.S.C. § 2000e-2(e) (1970) provides in pertinent part:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ [an employee] on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise . . . .

56. Other longevity features pointed out by the court included smoking and drinking habits, weight, health, and family longevity features. 553 F.2d at 587.

57. The Bennett Amendment, 42 U.S.C. § 2000e-2(h) (1970), has been incorporated into Title VII provisions of the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1970). The Bennett Amendment provides in part:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

42 U.S.C. § 2000e-2(h) (1970).

The Equal Pay Act states that:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .

29 U.S.C. § 206(d) (1970).

sex is 'based on any other factor other than sex'. Sex is exactly what it is based on.''[58]

An extensive study was made of the legislative history surrounding both the Equal Pay Act and Title VII. Congressional intent surrounding the Equal Pay Act was found in a Senate report.[59] As interpreted by the court, this report indicated that if an employer could show that he would be economically penalized by eliminating a wage differential based on sex, or could show that he would incur significant costs because of employing a particular sex, the Secretary of Labor could authorize an exception to the terms of the Equal Pay Act. This exception would allow the employer to continue a wage differential based on sex.[60] This Congressional report was of no assistance to the department's cause, however, since there was nothing in the record to show that the Department would be ''economically penalized'' by not requiring higher payments from women, and the department did not claim it would be so penalized.[61] The department ''requires higher contributions only because it believes that the pension fund itself will thereby be better funded and easier to administer.''[62] Finding no support for the department's use of sex-based mortality tables, the court held that such practice violated Title VII.[63]

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58. 553 F.2d at 588.
59. S. REP. NO. 176, 88th Cong., 1st Sess. 4 (1963).
60. 553 F.2d at 588-89.
61. *See* 387 F. Supp. at 984 n.1.
62. 553 F.2d at 589. There is little legislative history surrounding the sex discrimination aspect of Title VII. However, a few hours after the passage of the Bennett Amendment to Title VII, Senator Hubert Humphrey responded to a question concerning differences of treatment between men and women in industrial benefit plans, including earlier retirement options for women. Senator Humphrey said that there was no doubt that such differences could continue in operation under Title VII and that the Bennett Amendment had made the point perfectly clear. 110 CONG. REC. 13663-64 (1964). *See* notes 92-93 *infra* and accompanying text. This piece of legislative history was also found to be of no assistance to the department, as the colloquy in question took place "hours after the passage of the Bennett Amendment and cannot be said to be part of the legislative history of the amendment." 553 F.2d at 589.
63. The court stated:

> We emphasize that our holding rests on the clear policy behind Title VII of requiring that each employee be treated as an individual. Setting retirement contribution rates solely on the basis of sex is a failure to treat each employee as an individual; it treats each employee only as a member of one sex. . . . Our holding is limited to the proposition that when sex is singled out as the only, or as a predominant, factor, the employee is being treated in a manner which Title VII forbids.

553 F.2d at 590-91. The second part of the court's opinion dealt with the argument of the department that it should not be required to refund the plaintiffs' excess contributions. The court held that the department was required to make the reimbursement to satisfy "the compelling claim of the plaintiffs to recover the money which they were wrongfully required to contribute." *Id.* at 592.

In light of the U.S. Supreme Court's decision in *General Electirc Co. v. Gilbert*[64] the department petitioned for a rehearing of *Manhart*. The court of appeals found *Gilbert* inapplicable.[65] The analysis in *Gilbert* was of, as the Supreme Court termed it, a facially neutral policy. To violate Title VII such policy must be shown to have a discriminatory impact; this impact was not evident in *Gilbert*. The court of appeals pointed out that the analysis in *Manhart* was of a facially discriminatory policy: contribution rates based solely on sex. Consequently, no discriminatory impact need be shown. This policy violated Title VII unless it could come within one of Title VII's exceptions and the court had found it could not.[66]

While the Supreme Court, in *Gilbert*, had emphasized the inconsistent administrative agency rulings regarding pregnancy-related disability plans, the court of appeals in *Manhart* emphasized the consistency of administrative rulings regarding employee contributions to retirement plans.[67] The court considered as typical a ruling by the Equal Employment Opportunity Commission dealing with the exact question before the court: "[S]ex-based actuarial tables cannot be used by an employer to justify [the requirement of] a higher contribution from members of one sex where benefits to members of both sexes are the same."[68] Thus, the court concluded that the decision in *Gilbert* did not require a change in its judgment that Title VII of the Civil Rights Act of 1964 was violated by a retirement plan in which women were required to contribute more than men.

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64. 429 U.S. 125 (1976). In this case, the Supreme Court held that a disability plan which did not cover pregnancy-related disabilities did not violate Title VII. An unlawful employment practice which violates Title VII is sex-based discrimination. Since the Supreme Court had previously held, in Geduldig v. Aiello, 417 U.S. 484 (1974), that such a disability plan was not sex-based discrimination (as it was not based on gender as such but on pregnancy), and since there was no discriminatory effect shown, there was no unlawful employment practice to trigger a violation of Title VII.

65. 553 F.2d at 592 (petition for rehearing).

66. In General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), the Supreme Court relied heavily on Senator Humphrey's statement after the passage of the Bennett Amendment. 429 U.S. at 144. *See* note 62 *supra* and accompanying text. Although the court of appeals recognized that it was bound by such reliance, it refused to change its opinion even though it had disregarded that piece of legislative history. 553 F.2d at 593.

67. 553 F.2d at 593-94 (petition for rehearing). Consideration of administrative rulings played a large part in the original opinion in *Manhart* as well as in the opinion denying the department's petition for rehearing. *See* notes 94-103 *infra* and accompanying text.

68. EEOC Dec. #75-147, Jan. 13, 1975, [1975] 2 EMPL. PRAC. GUIDE (CCH) ¶ 6447. As the dissent points out, the majority dismissed a Wage and Hour Administration regulation on which the Supreme Court in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), had placed much emphasis. The regulation provides that

> [t]he mere fact that the employer may make unequal contributions for employees of opposite sexes in [a plan providing insurance or other benefits to employees]

III. THE APPLICABLE LAW

It is obvious that the use of sex-based mortality tables results in different treatment of similarly situated annuitants. But does this differential treatment violate either the Constitution or Title VII of the Civil Rights Act of 1964? The courts in *Reilly* and *Manhart* respectively found that it did. As previously stated, this article concurs with the decision in *Manhart* but disagrees with that in *Reilly*. This position is not inconsistent because a practice which violates the sex discrimination prohibitions of Title VII does not necessarily constitute sex discrimination in violation of the fourteenth amendment to the Constitution.[69]

The Fourteenth Amendment

The equal protection clause of the fourteenth amendment guarantees every person equal protection under the law.[70] Originally the Supreme Court required that, to be consistent with the equal protection clause, a classification must be "reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike."[71]

> will not, however, be considered to indicate the employer's payments are in violation of [the Equal Pay Act], if the resulting benefits are equal for such employees.

29 C.F.R. § 800.116(d) (1976). The majority explained that this provision contemplates employer contributions, not compulsory employee contributions such as are involved in the case at bar. 553 F.2d at 594.

69. *See* Washington v. Davis, 426 U.S. 229, 238 (1976). However, the dissent in General Elec. Co. v. Gilbert, 429 U.S. 125, 154, n.6 (Brennan, J.), argued that the majority had implied "that the Fourteenth Amendment standard of discrimination is coterminous with that applicable to Title VII." That case, though, involved a facially neutral classification not based on gender as such. *See* note 64 *supra* and accompanying text. The majority found no showing that the classification discriminated against women, which would be necessary to establish a violation of Title VII when a facially neutral classification is involved. The analysis of a facially neutral classification under the fourteenth amendment or under Title VII requires that a discriminatory effect must be shown. If this is not apparent, the analysis stops and the classification violates neither provision. This was the situation in *Gilbert*. Where a facially discriminatory classification is involved the analysis differs.

70. Note that the prohibition is directed to the states. The fourteenth amendment does not affect private action or purely social relationships. Since the defendants involved in the immediate cases were state governmental units, the fourteenth amendment proscription applied to them. A different situation would present itself if an individual woman purchased an annuity through a life insurance agent and was adversely affected by the insurance company's use of sex-based mortality tables. Whether the fact that the insurance industry is heavily regulated by the states would result in a private insurance company's action being termed state action, and thus subject to the fourteenth amendment, is debatable. *See* Note, *State Action and the Burger Court*, 60 VA. L. REV. 840 (1974).

71. F.S. Royster Guano Co. v. Virginia, 253 US. 412, 415 (1920).

This standard, often referred to as the rational basis test, has been applied by the Court unless a "suspect classification" or a "fundamental interest" is involved.[72] If either of these is involved the Court will exercise "strict scrutiny." In other words, the classification must be necessary to achieving a legitimate state purpose.[73]

Sex has never been regarded as a suspect classification, but neither has the Court automatically applied the rational basis test to a classification based on sex. Instead, the Court has required that a classification based on sex "must serve important governmental objectives and must be substantially related to achievement of the objectives."[74] This intermediate standard is not as severe as the strict scrutiny reserved for suspect classifications and fundamental interests, but it is more demanding than the rational basis test. Unlike the rational basis test, there is no presumption that the legislation creating the classification is constitutional. This "strict rational basis test" was not applied in *Reilly*[75] but will be applied for the purposes of this article's analysis.

It is obvious that the first step in this analysis is the identification of the governmental objectives on which a classification is based. In the context of *Reilly*, it is necessary to examine two objectives—the objective behind the development of the Indiana State Teachers' Retirement Fund, and the objective behind the Fund's use of sex-based mortality tables. The Indiana Supreme Court decided that the first objective was to provide an incentive to all teachers to remain in a teaching career and to accept moderate teaching salaries, foregoing other employment opportunities.[76] The second objective, behind the use of sex-based mortality tables, was to provide a solvent, self-sustaining annuity fund for teachers.

The objective of providing an incentive for teachers to remain in teaching is undoubtedly an important one. The incentive comes from the teacher's expectation of receiving a certain monthly payment during retirement for as long as he or she should live. The incentive, however, is not the expectation of receiving a certain total sum. The Indiana Supreme Court correctly pointed out that what is important is having the monthly

72. Suspect classifications recognized by the Court are race, alienage, and illegitimacy. Fundamental interests recognized by the Court are voting, criminal appeals, and the right of interstate travel. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).
73. Loving v. Virginia, 388 U.S. 1, 11 (1967).
74. Craig v. Boren, 429 U.S. 190, 197 (1976).
75. *See* note 36 *supra* and accompanying text.
76. *See* note 37 *supra* and accompanying text.

income to meet daily human needs.[77] Through the use of sex-based mortality tables a male teacher has a greater monthly income. Therefore, the Indiana Supreme Court found that classification of annuitants by sex had no real and substantial relationship to the identified governmental objective.

A consideration of the second objective leads to a different conclusion. It is undisputed that a self-sustaining annuity fund is an important governmental objective. This annuity fund was intended to function in accordance with insurance concepts.[78] The amount of monthly benefits payable was matched to both the contribution rate and to the estimated period over which such benefits were to be payable. The use of sex-based mortality tables permits an accurate determination of both benefits and contributions. Thus, the use of sex-based mortality tables creates a classification which is substantially related to the achievement of this important governmental objective.

It is contended that this analysis by the Indiana Supreme Court was incomplete.[79] After finding that a classification by sex is discriminatory, it is necessary to question whether this discrimination is purposeful. Demonstration of a discriminatory purpose is critical in making out an equal protection violation.[80] An examination of the defendants' arguments establishes that the defendants believed the treatment of male and female annuitants was equal.[81] As a class, women would receive as much benefit from the annuity fund as men because, theoretically, they would live longer. The purpose therefore, was not to discriminate against female annuitants, but to insure that all annuitants were treated equally in terms of total benefits.

Thus, if the Supreme Court had granted certiorari to *Reilly*, the Court probably would have upheld the distinction between male and female annuitants as not violative of the equal protection clause of the fourteenth amendment. Using the strict rational basis test, the classification based on sex serves the important governmental objective of a solvent, self-sustaining annuity fund; the classification is substantially

77. *See* note 39 *supra* and accompanying text.
78. The Board of the Indiana State Teachers' Retirement Fund was authorized to conduct an actuarial investigation at least once every six years to determine the level of contributions necessary to provide the required benefits. 360 N.E.2d at 173.
79. *See* note 45 *supra*.
80. Washington v. Davis, 426 U.S. 229, 238-245 (1976).
81. The dissent in *Reilly* argues that the purpose behind the change to sex-based mortality tables, *see* note 34 *supra*, was to remedy what the Board of Trustees of the fund saw as unequal treatment of male and female annuitants existing before adoption of the tables: Male and female teachers made equal contributions and, upon retirement, were given equal monthly benefits.

related to the achievement of that objective and thus is constitutional. Even if the classification based on sex does not serve the other important governmental objective, of providing an incentive for teachers to remain in teaching, the resulting discrimination is not violative of the equal protection clause because it is not purposeful.

Title VII

An analysis of sex-based mortality tables in terms of Title VII of the Civil Rights Act of 1964,[82] yields a different answer. The practice of using sex-based mortality tables, which results in female annuitants being required to pay more or receive less than male annuitants, violates the sex discrimination prohibitions of Title VII.[83]

This analysis involves several considerations: Title VII itself, a provision of the Equal Pay Act, the interpretations of Title VII by the Equal Employment Opportunity Commission (EEOC), and the interpretations of the Equal Pay Act by the Wage and Hour Division. The Bennett Amendment to Title VII brought a section of the Equal Pay Act within the provisions of Title VII.[84] This means that the same exceptions permitted by the Equal Pay Act are available under Title VII. Thus, an employer charged with sex discrimination under Title VII has two possible defenses: the BFOQ defense under Title VII[85] and the "any factor other than sex" defense under the Equal Pay Act as incorporated into Title VII.[86]

> Because of the fact . . . that women have a greater life expectancy than men, the result was an unequal treatment based upon sex. This unequal treatment favored women retirees, in that as a group they received the same monthly benefits, but received them for a longer period of time due to their longevity.
>
> It is obvious from the facts of the case that the Board determined that such unequal treatment should not prevail and that the sexes should be treated equally.

360 N.E.2d at 180.

82. *See* note 47 *supra*.

83. This conclusion agrees with that of every article, except one, which has considered the issue. *See* Bernstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs*, 74 COLUM. L. REV. 1203 (1974); Gold, *Equality of Opportunity in Retirement Funds*, 9 LOY. L.A.L. REV. 596 (1976); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971); Note, *Sex Discrimination and Sex-Based Mortality Tables*, 53 B.U.L. REV. 624 (1973); Note, *Mortality Tables and the Sex-Stereotype Doctrine: Inherent Discrimination in Pension Annuities*, 51 NOTRE DAME L. REV. 323 (1975). *But see* Gerber, *Economic and Actuarial Aspects of Selection and Classification*, 10 FORUM 1205 (1975).

84. *See* note 57 *supra*.

85. *See* note 55 *supra*.

86. Note that both these defenses were considered by the court of appeals in *Manhart*. *See* notes 55-62 *supra* and accompanying text. Another defense which an employer raised several years ago, that Title VII doesn't even apply to retirement funds, no longer seems valid. *See* Bartmess v. Drewrys, U.S.A., Inc., 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971). For a discussion of this issue, using the rationale of the

Title VII forbids distinctions based on sex with respect to an individual's hiring, discharge, compensation, terms, conditions, or privileges of employment. As the court in *Manhart* pointed out, that type of distinction is exactly the one made by the City of Los Angeles, Department of Water and Power. "A greater amount is deducted from the wages of every woman employee than from the wages of every man employee whose rate of pay is the same. . . . The higher contribution is required specifically and only from women as distinguished from men."[87] Such a policy is discriminatory on its face. Unless the employer can raise some defense to the mandate of Title VII, this type of discrimination must fail.

One defense which can be raised to a charge of discrimination in violation of Title VII is the BFOQ defense: an employer is allowed to hire an individual on the basis of the individual's religion, sex, or national origin in those certain instances where such a characteristic is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. Although this defense was considered and subsequently rejected in *Manhart*, a careful reading of Title VII reveals that it cannot be used as a defense by an employer charged with discrimination in regard to the compensation, terms, conditions, or privileges of employment.[88] The language of the statute specifically restricts the application of the BFOQ defense to situations involving hiring and employment. Since an employee benefit plan, of which an annuity fund is a part, is relevant to the compensation, terms, conditions, or privileges of employment, discrimination in the operation of such a plan cannot be justified on the basis of the BFOQ defense.[89] An employer may hire or refuse to hire an individual on the basis of a bona fide occupational qualification, but once an individual is hired, the employer

court in *Bartmess* as a framework, see Gold, *supra* note 83. This argument seeks to avoid having to come within an exception to the prohibition of Title VII by denying the applicability of Title VII to employee benefit programs in the first place. The federal district court in *Manhart*, 387 F. Supp. at 982, joined five federal circuits in affirming at the outset that Title VII applies to retirement funds. Gold, *supra* note 82, at 599. The court of appeals in *Manhart* apparently agreed, as it didn't even consider the issue before holding that a violation of Title VII had occurred.

A more valid argument, perhaps, is that the Equal Pay Act does not, without the Bennett Amendment, apply to retirement funds. *See* Note, *Sex Discrimination and Sex-Based Mortality Tables, supra* note 83. Note, too, that the Supreme Court in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), did not question Title VII's applicability to employee benefit programs.

87. 553 F.2d at 593.

88. *Compare* 42 U.S.C. § 2000e-2(a)(1) (1970), *with* 42 U.S.C. § 2000e-2(e) (1970). *See* notes 47, 55, *supra* for the text of these statutes.

89. *See* B. BABCOCK, A. FREEDMAN, E. NORTON, & S. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 243 (1975).

must treat that individual as all other employees are treated.[90] Thus the BFOQ defense is of no assistance to the defendant in this circumstance.

A second defense the employer may utilize in defending an alleged violation of Title VII is that the Equal Pay Act permits the discrimination. This act allows unequal pay for equal work if the "payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."[91] In support of this interpretation of these statutes, an employer charged with operating a discriminatory employee benefit program can rely on the legislative history of the Bennett Amendment, which incorporated this provision of the Equal Pay Act into Title VII. The purpose of the Bennett Amendment was to make it unmistakably clear that differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue under Title VII. This contention emanates from a statement made by Senator Hubert Humphrey subsequent to the passage of the Bennett Amendment.[92] The court in *Manhart* however dismissed Senator Humphrey's remark as an erroneous interpretation of the Equal Pay Act.[93] Since the Bennett Amendment on its face merely states that the inequality in payments allowed under the Equal Pay Act will be allowed under Title VII, the answer of the court in *Manhart* seems the best answer to an argument based on this legislative history.

Employers faced with a charge of discrimination may seek to come within one of the factors allowing for unequal pay. In *Manhart*, the employer sought to justify the requirement that female employees contribute more to the annuity fund by saying the requirement was pursuant to a differential based on a factor other than sex, namely, the disparity in longevity between men and women. Since this actuarial distinction,

90. Where the BFOQ defense can be validly raised, it has been narrowly interpreted. The EEOC has directed this interpretation, *see* 29 C.F.R. § 1604.2(a) (1976), and the courts have agreed. "[*N*]*ecessary* to the normal operation of that particular business" (emphasis added) has been held to mean that "discrimination based on sex is valid only when the *essence* of the business operation would be undermined." Diaz v. Pan American World Airways, 442 F.2d 385, 388 (5th Cir. 1971). As the court in *Manhart* correctly pointed out, "Discriminating against women in setting the amount of retirement contributions in no way affects the ability of the Department to provide water and power to the citizens of Los Angeles." 553 F.2d at 587. *See also* note 55 *supra* and accompanying text.

91. 29 U.S.C. § 206(d) (1970).

92. *See* note 62 *supra* and accompanying text. Senator Humphrey apparently felt that the Equal Pay Act allowed sex-based differences in retirement ages and benefits and that this allowance was carried over into Title VII by the Bennett Amendment. This interpretation of the Bennett Amendment has been criticized since the Equal Pay Act made no such provisions. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, supra* note 83, at 1173 n.37.

93. 553 F.2d at 589. *See* note 92 *supra*.

which allows a determination of costs, distinguishes only along sexual lines, it cannot be claimed that the differential is based on a factor other than sex.[94]

IV. THE REQUIREMENTS OF TITLE VII

Equal Contributions and Equal Benefits

The use of sex-based mortality tables, which results in greater contributions by women for equal annuity benefits, violates Title VII, and employers' defenses are inapplicable. Therefore, it is necessary to determine what Title VII requires of employee benefit programs. The fundamental precept of Title VII, as stated by the Equal Employment Opportunity Commission, the agency charged with administering and enforcing Title VII, is that generalizations relating to sex cannot be permitted to influence the terms and conditions of an *individual's* employment, even where the generalizations are statistically valid.[95] EEOC guidelines issued in 1972 set out what is required of fringe benefits of employment to comply with Title VII: "It shall be an unlawful employment practice for an employer to have a pension or retirement plan which . . . differentiates in benefits on the basis of sex."[96] In addition, the EEOC has stated that Title VII is not concerned with whether benefits to each sex group *as a class* are equal, but with whether individual benefits are equal.[97] This same guideline says that "[i]t shall not be a defense

94. This argument has also been addressed by the Wage and Hour Administrator, the official in charge of administering and enforcing the Equal Pay Act. According to the Administrator, a differential based on claimed differences between the average cost of employing females, as a group, and the average cost of employing males, as a group, does not qualify as a differential based on any factor other than sex and results in a violation of the equal pay provisions. 29 C.F.R. § 800.151 (1976). Note that a third defense exists which may be available to some employers: the judge-made doctrine of business necessity. The business necessity defense can be raised by an employer when the discrimination charged results from a policy which is neutral on its face. This situation is to be distinguished from the *Manhart* situation in which the discrimination is not neutral on its face. The business necessity defense was first articulated in Griggs v. Duke Power Co., 401 U.S. 424 (1971). In order to establish the defense, an employer must establish that (1) the act which is discriminatory does more than serve a legitimate managerial function; (2) the act is essential to the ends of safety and efficiency; and (3) there are no less discriminatory alternatives. *See* United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971). Assuming that this defense was available to an employer who operated an annuity fund and assuming that the use of sex-based mortality tables met the first two requirements, the third requirement could not be met, as there are other factors besides sex on which mortality tables could be based. *See* notes 15-16 *supra* and accompanying text.

95. EEOC Dec. #75-147, Jan. 13, 1975, [1975] 2 EMPL. PRAC. GUIDE (CCH) ¶ 6447 (emphasis in original).

96. 29 C.F.R. § 1604.09 (1976).

97. *Id.*

under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other."[98]

The EEOC has also issued two administrative decisions which, when read together, indicate how the EEOC, whose opinions are entitled to great deference,[99] interprets this requirement of Title VII. The first decision involved an employer who contributed lower monthly pension payments to female annuitants than to male annuitants on the basis of sex-based mortality tables which indicated that females had a greater life expectancy. The EEOC regarded this practice as highly suspect and stated that compliance with Title VII required periodic pension benefits paid to males and females in equivalent circumstances to be equal.[100] The second decision concerned a situation in which an employer required its female employees to contribute more to the retirement plan than similarly situated male employees. Referring to the previously discussed decision, the EEOC found, as an inescapable corollary, that an employer may not require a higher contribution from members of one sex where benefits to members of both sexes are the same.[101]

Through these decisions, the EEOC has interpreted Title VII as requiring both equal contributions and equal benefits. Furthermore, equal benefits does not refer to a statistically determined average total payment received by members of the same sex. It refers to "a pension of x dollars per month."[102] Therefore, an individual female annuitant can not be required to contribute more to, or to receive less per month from, an annuity fund than a similarly situated male annuitant.

The opinions of the Wage and Hour Administrator are also relevant to a determination of what is required of an annuity fund. While the Wage and Hour Administrator has not been as consistent as has the EEOC, in requiring both equal contributions and equal benefits,[103] the Administrator has ruled that the classification of employees solely on the basis of sex for purposes of cost comparison violates the Equal Pay Act.[104] Since this is exactly what sex-based mortality tables do, it is a

98. *Id.* Although this regulation is more on point with the situation found in *Reilly*, i.e. a differentiation in benefits on the basis of sex rather than a differentiation in contributions on the basis of sex, it shows that Title VII requires equal benefits even if the cost of such benefits is greater for one sex than the other.
99. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).
100. EEOC Dec. #74-118, April 26, 1974, [1975] 2 EMPL. PRAC. GUIDE (CCH) ¶ 6431.
101. EEOC Dec. #75-147, Jan. 13, 1975, [1975] 2 EMPL. PRAC. GUIDE (CCH) ¶ 6447.
102. *Id.*
103. *See* note 68 *supra*.
104. 29 C.F.R. § 800.151 (1976). *See* note 94 *supra* and accompanying text.

valid assumption that use of such tables constitutes a violation of the act.[105]

According to *Manhart*, if an employer requires female employees to contribute more to an annuity fund than male employees, it is in violation of Title VII. According to the EEOC, if either contributions or benefits are unequal, the employer is in violation of Title VII. Obviously the employer must dispense with sex-based mortality tables since their use results in either unequal contributions or unequal benefits. But the employer must then find some way to determine costs and benefits. The court of appeals in *Manhart* left open the legality of determining contribution rates based on a number of actuarially significant characteristics, one of which is sex.[106] Another possibility is the use of a unisex mortality table.[107]

The Male Annuitant's Reaction

A discussion of Title VII requirements for annuity funds would be incomplete without a word about the reaction of male employees. Both the Indiana Supreme Court in *Reilly* and the dissenting judge in *Manhart* addressed the issue of the male employee whose monthly benefits remain the same while his monthly contribution to an annuity fund administered in accordance with Title VII requirements is increased. The employee may feel that he is being required to subsidize the female employees. He may believe that women as a class will receive more in annuity benefits than men as a class if both individual contributions and individual benefits are equal. The second circuit has spoken on the subject of the unhappiness of employees who are faced with measures necessary to

105. However, as previously noted, the Wage and Hour Administrator has also ruled that an employer has a choice: either make equal contributions for each employee into an annuity fund or provide equal annuity benefits for each employee. 29 C.F.R. § 800.116(d) (1976). If this interpretation were followed, both the situation in *Reilly* (equal contributions) and the situation in *Manhart* (equal benefits) would conform to the Equal Pay Act even though inequality in payments is legal only as long as it is based on factors other than sex. *See* note 94 *supra* and accompanying text. This interpretation by the Wage and Hour Administrator also conflicts with the consistent interpretations by the EEOC. *See* notes 94-98 *supra* and accompanying text. Since the EEOC is charged with interpreting Title VII its opinions are entitled to greater weight.

106. 553 F.2d at 591.

107. This table would, in effect, result from an averaging of the existing male and female tables. Since the unisex table would contain an average of male and female death/life expectancies, the fund would, on the average, benefit from each male participant, and lose from each female participant. One problem with such a table is that it could result in the underfunding of an annuity fund where the majority of contributors are female employees. *See* Gold, *supra* note 83 at 627. Gold suggests determining the costs of an annuity program through the use of sex-based mortality tables and then, by use of a unisex table, spreading the costs equally among all the participants, regardless of sex.

redress past discrimination: "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."[108] Similarly, when an annuity is considered as a certain monthly payment for as many months as the annuitant lives, instead of as a lump sum depending on how long the annuitant lives, the major problem is solved. The purpose of an annuity is not to secure a total dollar benefit equal to every other annuitant, but to assure that a check arrives each month and does so for the rest of the annuitant's life. It is immaterial that another annuitant, either male or female, is still alive, still receiving checks, and will ultimately collect a greater total sum. The male annuitant knows that the similarly situated female annuitant worked as many years as he did, was paid the same salary, and contributed the same amount into the annuity fund. The male annuitant should realize that she faces the same expenses in retirement that he does. It is unreasonable to assume that with such knowledge, he would begrudge the female annuitant her equal monthly benefit on the basis that she may outlive him.

The underlying premise of an annuity fund is subsidation. The annuitant who exceeds his life expectancy receives his additional monthly benefits from the contributions of those annuitants who failed to fulfill their life expectancies.[109] The male annuitant is already subsidizing those male annuitants who exceed their life expectancies and the female annuitant is already subsidizing those female annuitants who exceed their life expectancies. The subsidation of one annuitant by another exists as the financial mainstay of the fund. A plan requiring equal benefits and equal contributions would be merely a change in form wherein all annuitants would subsidize those annuitants who exceed their life expectancies, as opposed to men subsidizing men and women subsidizing women.

CONCLUSION

The use of sex-based mortality tables is deeply entrenched in the insurance industry for valid business reasons. Insurance deals with groups of people, not with individuals, and equal treatment of groups is what the insurance industry believes to be financially sound. Women as a class live longer than men as a class and so they should either pay more

There is no doubt that the insurance industry could remedy the problem and alleviate the discrimination if it so desired. One possible solution would involve a modified unisex table based upon the percentages of male and female annuitants benefited by the fund.

108. United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971).

109. *See* note 23 *supra* and accompanying text.

for the annuity benefits they receive or receive smaller benefits over their longer lifetime. But an employer subject to the dictates of Title VII, who operates an annuity fund, must treat each employee as an individual. The employer cannot allow sex-based generalizations to influence the compensation, terms, conditions, or privileges of employment of an employee. Sex-based mortality tables embody the generalization that women live longer than men. This generalization substantially influences the terms on which women participate in the annuity fund. Consequently, the use of sex-based mortality tables results in discrimination toward female employees which violates Title VII of the Civil Rights Act of 1964.

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